In re Matter of L.R.J., 2023 MT 1, __ P.3d ___ (Jan. 3, 2023)

- **Holding:** Court-approved stipulation granting custody of two Indian children to their paternal grandparents, subject to modification only upon court order, constituted a foster care proceeding under ICWA, but return of the children to her custody was not automatic but instead subject to "the substantial and immediate danger or threat of such danger" exception in 25 U.S.C. § 1920.
- **Summary:** In 2017, the parents of two children entered into a court-approved stipulated parenting plan with the father's parents. It provided in part that "Grandparents may allow contact or visitation between children and Parents, but such contact shall be at the sole discretion of Grandparents until June 15, 2018" and that thereafter "Parents may file an appropriate motion to either modify custodial rights to the minor children or establish parental visitation on a regular schedule" upon showing that such modification was in the children's best interests. Visitation and other disputes eventually arose, resulting in a court-directed parenting assessment by a psychologist and appointment of a guardian ad litem whose report and recommendation was adopted by the court. However, in 2021, the mother notified the court that she was withdrawing her consent to the parenting plan under 25 U.S.C. § 1913(b), pointing to her membership in an Alaska Native village and the children's eligibility for membership. The grandparents opposed the motion on the basis of *In re Bertelson*, 189 Mont. 524, 617 P.2d 121 (1980), which they argued stood for the proposition that the Indian Child Welfare Act did not apply to intra-family disputes. The district court denied the motion because '"[t]aking the children out of their current, stable setting would cause trauma'" and therefore "ordered Parents to comply with the terms of the guardian ad litem's plan." The mother appealed, and the supreme court reversed and remanded.

  The court first held that ICWA did apply. It looked to the definition of "foster care proceeding" in § 1903(1)(i) that encompasses "any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated." Here, "[t]he Stipulated Parenting Plan that Mother signed in 2017 plainly 'operate[d] to prohibit the [children's] parent ... from regaining custody of the [children] upon demand'" (quoting 25 C.F.R. § 23.103(b)(4)). The court distinguished *Bertelson* factually but, "[i]n any event," deemed the decision's "conclusory statement that ICWA has no application to an 'internal family dispute' ... incorrect when the parent's voluntary placement of the child with another person does not allow the parent to regain custody of the child 'upon demand.'"

  That the district court had violated ICWA in not establishing "the validity of Mother's consent under § 1913(a), which requires such consent to be, inter alia, "executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian[,]" and in subsequently refusing "to honor Mother's withdrawal of that consent, even if error," nevertheless did "not preclude the court from determining whether it is appropriate to invalidate the children's placement with Grandparents." On this point, the supreme court rejected applicability of § 1913(b), which states that "[a]ny parent or Indian custodian may withdraw consent to a foster care placement under State law at any

time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian[,]" and instead found § 1920 controlling:

> Where any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

Citing *In re Dependency of A.L.K.*, 196 Wash. 2d 686, 478 P.3d 63 (2020), the court held that the proper remedy was not only to vacate the stipulation but also "'to remand for a determination of whether returning the children would subject the children to substantial and immediate danger or threat of danger.'" It noted in this regard the grandparents' argument "that the history of this case shows the risks of mental and physical harm to the children if placed immediately in Mother's care" and aspects of the psychologist's and guardian ad litem's assessments and recommendations that showed concerns about the children's possible "dysregulation" upon immediate return.

- **Relevant (2022) Deskbook Sections:** 13:4 n.6; 13:28 n.7
- **Comment:** The supreme court's refusal to apply § 1913(b)'s express requirement is problematic. Its reliance on § 1920 effectively placed the grandparents in a better position than they would have occupied had the district court complied with the consent requirements in § 1913(a). The decision in *A.L.K.* is inapposite even if otherwise correct, since it involved the appropriate remedy for violation of the active-efforts requirement. Here, § 1913(b) speaks directly to the appropriate remedy.